STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 22, 2006
v	No. 260356 Kent Circuit Court
TARVIS ANTHONY CUTTS, Defendant-Appellant.	LC No. 01-008381-FH

Before: Zahra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(iv), and carrying a concealed weapon, MCL 750.227. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 6 to 40 years' imprisonment for possession with intent to deliver and 3 to 20 years' imprisonment for carrying a concealed weapon. Defendant appeals as of right. We affirm.

Defendant originally filed a claim of appeal on August 15, 2002. On May 6, 2004, this Court remanded for an evidentiary hearing on defendant's claim of ineffective assistance of counsel to allow the prosecutor an opportunity to develop the record regarding whether the search of defendant's automobile, which led to the finding of drugs and a gun, was constitutional. Following the *Ginther*[1] hearing, the trial court denied defendant's motion for a new trial based on ineffective assistance of counsel and a final order was entered on December 14, 2004. Defendant appeals from that order.

On August 1, 2001, two officers on patrol stopped at a motel after seeing two known prostitutes out front. As they were speaking with the two women, defendant approached and told the officers he was going to give the women a ride, but had locked the keys in his car. An officer checked defendant's background and learned he was on parole. Meanwhile, two motel employees, at different times, informed the officer about possible criminal activities of

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973)

defendant. One employee indicated that defendant tried to sell him "acid". The other employee said that defendant tried to give her his vehicle keys because he had a gun in his car. Defendant was arrested several blocks away after his parole officer authorized his arrest for associating with a known prostitute. Following defendant's arrest, officers searched his vehicle where a loaded gun and crack cocaine were discovered.

On appeal, defendant asserts that he received ineffective assistance of counsel when his counsel did not move to suppress the evidence found in the vehicle.

A determination concerning whether a defendant has been deprived of effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *Id*. Effective assistance of counsel is presumed, and the defendant has a heavy burden of proving otherwise. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In order to establish ineffective assistance of counsel, the attorney's performance must have been "objectively unreasonable in light of prevailing professional norms" and, "but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). The defendant bears the burden of proving that his counsel was ineffective. *Id.*

The Fourth Amendment to the United States Constitution and the Michigan Constitution protect against unreasonable government intrusions by requiring the police to obtain a warrant before conducting a search or seizure. *People v Taylor*, 253 Mich App 399, 403; 655 NW2d 291 (2002). The remedy for a Fourth Amendment violation is suppression of evidence confiscated as the result of an unconstitutional search. *People v Cartwright*, 454 Mich 550, 558; 563 NW2d 208 (1997). "Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions." *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). Two of those exceptions are relevant to this appeal: (1) the automobile exception, and (2) the impound and inventory search.

If a car is readily mobile and probable cause exists to believe it contains contraband, the police are permitted under the Fourth Amendment to search the car, its compartments, and any containers within it without a warrant. *Maryland v Dyson*, 527 US 465, 467; 119 S Ct 2013; 144 L Ed 2d 442 (1999); *People v Carter*, 194 Mich App 58, 61; 486 NW2d 93 (1992). In order for the automobile exception to apply there must be probable cause to support a search. The determination whether probable cause exists should be made in a commonsense manner in light of the totality of the circumstances. *People v Garvin*, 235 Mich App 90, 102; 597 NW2d 194 (1999). Probable cause requires a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* Probable cause may be based on information from an informant, named or unnamed, if it is shown that the informant spoke from personal knowledge, and (a) the informant is credible, or (b) the information is reliable. MCL 780.653; *People v Hall*, 158 Mich App 194, 198; 404 NW2d 219 (1987). In determining whether probable cause existed justifying a search or seizure, the court must examine a police officer's observations in light of her experience and training, not in a vacuum or from a hypertechnical perspective. *People v Levine*, 461 Mich 172, 185; 600 NW2d 622 (1999).

The two informants that spoke with the police had provided the officer with reliable information many times in the past. The officer was familiar with both employees and had no reason to doubt the veracity of their statements. The tip from a hotel employee known to be reliable in the past, concerning the gun in the car provided a basis to enable "a person of reasonable prudence" to believe that evidence of a crime or contraband was in a particular place. *People v Sinistaj,* 184 Mich App 191, 200; 457 NW2d 36 (1990). This tip became even more substantial when defendant was arrested and police discovered that he had removed his car keys from his key chain and put them down his pants. The police could reasonably infer that defendant did not want anyone easily accessing the vehicle. Looking at the totality of the circumstances from the officer's trained perspective, we find that the officers had probable cause to search the car. The two tips from reliable sources, the car keys being removed from the key chain and hidden, defendant being in the company of known prostitutes, and defendant already being on parole for drug related offenses established probable cause to believe that contraband was in the vehicle.

Additionally, this search was also constitutional under the inventory exception to the warrant requirement. This exception requires that an impoundment of a vehicle and search be conducted in accordance with established departmental policy that limits the discretion of an individual officer and makes the impoundment primarily a matter of policy. *People v Green,* 260 Mich App 392, 410-411; 677 NW2d 363 (2004). The search must be conducted pursuant to standardized police procedures and must not be used as a pretext for criminal investigations. *Id.* at 412-413. "The goal is to prevent inventory searches from being used as a 'ruse for general rummaging in order to discover incriminating evidence.'" *People v Poole*, 199 Mich App 261, 265-266; 501 NW2d 265 (1993). "A number of courts have recognized that the possibility of theft or vandalism is a valid reason for impounding a car upon the arrest of the driver, especially where no other person is present to take control of the car." *People v Krezen,* 427 Mich 681, 687-688; 397 NW2d 803 (1986).

It is necessary to look to the impoundment policy of the Grand Rapids Police Department, to determine whether the impoundment and subsequent inventory search of defendant's vehicle was constitutionally valid. *Green, supra.* That policy provides that, when a driver is arrested and his vehicle is left unattended in a location that would constitute a traffic hazard or is highly susceptible to damage or theft, the police shall impound the vehicle. It also states that "[a]ll vehicles removed by the Grand Rapids Police Department for impound, evidence, or safekeeping shall be inventoried." Although no inventory report was presented, an officer testified that one was completed, but subsequently thrown away as was the practice after one or two years.

Here, the car was left in a high crime area and would not have been safe if left unattended. The motel, where the car was parked, had requested in the past that cars be removed when the owner was arrested. Using their discretion, the police could have reasonably concluded that the other people who were with defendant at the time of his arrest, were not responsible persons for the purposes of taking possession of the car. Additionally, even had there been other options regarding how to handle the vehicle, the officers would not have been obligated to choose them. Our Supreme Court has determined that the police acted reasonably when they decided to impound an arrested person's vehicle pursuant to standard procedures, even though there was an ability to exercise discretion to do something else with the vehicle. See *People v*

Toohey, 438 Mich 265, 285; 475 NW2d 16 (1991). See also *Colorado v Bertine*, 479 US 367, 374; 107 S Ct 738; 93 L Ed 2d 739 (1987).

The search of the car was constitutional, and therefore, defendant was not denied the effective assistance of counsel by his attorney's failure to move for suppression of the evidence. An attorney need not make meritless motions. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001).

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Donald S. Owens